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IN THE

Supreme Court of the United States

OCTOBER TERM—1969

No. ~~40~~ 13

UNITED STATES OF AMERICA,
Petitioner,

vs.

JAMES A. WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICI CURIAE* JOHN G. BRODY, SAMUEL DESIST, JACK A. PEARL, JOSEPH ALFRED TANNER AND RALPH TROPIANO, IN SUPPORT OF RESPONDENT JAMES A. WHITE

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TABLE OF CONTENTS

PAGE

THE PARTIES CONSENT TO THE FILING OF THIS AMICUS BRIEF 2

THE INTERESTS OF THE AMICI 2

ARGUMENT—Summary of Argument 5

Introductory to Argument 5

Point I—Individual human privacy has or should have the supreme value in humanistic, democratic society of the modern western type. This "value judgment" should be made controlling, as a matter of constitutional policy, in all cases of governmental electronic intrusion against private individuals. Except perhaps for situations of supreme public necessity involving the physical safety of the nation or of a particular populated community or vital public installation, and even then only for purposes of preventive security action by responsible governmental agencies at the highest level rather than for obtaining of prosecutorial evidence, no electronic eavesdropping — including methods involving no "tangible" physical intrusion in the conventional senses, and including so-called one-party-consent intrusions—can be constitutional under the Fourth, Fifth and Ninth Amendments 9

The "Philosophy" Of Electronic Eavesdropping And The Constitutional Values Which It Challenges Even When It Is Done With So-Called One-Party Consent 10

PAGE

Point II—

A. If Katz v. United States, 389 U. S. 347, is read as making the Fourth Amendment applicable to one-party-consent electronic monitoring of the type here involved, and if such applicability of Katz should be deemed nevertheless precluded in this case because of the "prospectivity" ruling of Desist v. United States, 394 U. S. 244, then the Desist ruling should be re-examined to determine whether the Court has dealt soundly with the whole problem of retroactivity-prospectivity in the serious of cases commencing with Linkletter v. Walker, 381 U. S. 618.

B. In any event, aside from problems of "retroactivity versus prospectivity" as such, Desist should be reconsidered in relation to Katz because Desist is unsound in failing to recognize that Katz applied pre-existing law of the Fourth Amendment.

C. In any event furthermore, the judgment in this White case should be affirmed on its particular facts—alleged one-party-consent monitoring by a Kel device—on the authority of Osborn v. United States, 385 U. S. 323; and Osborn should be held to have applied the pre-existing law of the Fourth Amendment or, via a reconsideration of Desist, Osborn should be given "retroactive" effect..... 29

CONCLUSION 43

PAGE

Cases Cited

Berger v. New York, 388 U. S. 41 ..... 6, 7, 9, 18, 39

Bloom v. Illinois, 391 U. S. 194 32

Burton v. United States, 391 U. S. 123 32

Butenko v. United States, No. 197, reported, 4 Criminal Law Reporter 4053 (October 23, 1968, Vol. 4, No. 4, Section 4) 36

Clinton v. Virginia, 377 U. S. 168 6

Desist v. United States, 394 U. S. 244, rehearing denied, —— U. S. ——, 23 L. Ed. 2d 251 ..... 2-4, 29, 30, 30fn, 31, 31fn, 32, 33, 35

DeStefano v. Woods, 392 U. S. 631 32

District of Columbia v. Little, 178 F. 2d 13 (C. A. D. C. 1950), aff'd 339 U. S. 1 10

Duncan v. Louisiana, 391 U. S. 145 32

Escobedo v. Illinois, 378 U. S. 478 31

Fuller v. Alaska, 393 U. S. 80 ..... 30fn

Gilbert v. California, 388 U. S. 263 32

Goldman v. United States, 316 U. S. 129 ..... 36, 37, 41

Griffin v. California, 380 U. S. 263 31

Jenkins v. Delaware, —— U. S. ——, 23 L. Ed. 253 ..... 3, 32

Johnson v. New Jersey, 384 U. S. 719 31

Katz v. United States, 389 U. S. 347 ..... 2, 4, 5, 7, 8, 29-31, 36-43

Kaiser v. New York, 394 U. S. 280 ..... 31fn

PAGE

Kaufer v. United States, 394 U. S. 458 ..... 31fn

Ker v. California, 374 U. S. 23 39

Lee v. Florida, 392 U. S. 378 ..... 30fn

Linkletter v. Walker, 381 U. S. 618 29-35

Lopez v. United States, 373 U. S. 427 39

Mapp v. Ohio, 367 U. S. 643 30

Marbury v. Madison, 1 Cranch. 137 21

McConnell v. Rhay, 393 U. S. 2 32

Miranda v. Arizona, 384 U. S. 436 ..... 31, 32

Mempa v. Rhay, 389 U. S. 128 32

Nordelli v. United States, 24 F. 2d 665 39

Olmstead v. United States, 277 U. S. 438 ..... 36, 37, 41

Osborn v. United States, 385 U. S. 323 ..... 5, 7, 7fn, 8fn, 29, 35, 39, 42, 43

Roberts v. Russell, 392 U. S. 293 32

Silverman v. United States, 365 U. S. 505 ..... 6, 37, 41, 42

Stovall v. Denno, 388 U. S. 293 32

Tehan v. Shott, 382 U. S. 406 31

United States v. Missler (C. A. 4, decided August 25, 1969—Sobeloff, J.), 5 Criminal Law Reporter 2405, September 3, 1969 ..... 6fn

United States v. Wade, 388 U .S. 218 32

U. S. v. White, No. 46, p. 20, n. 5 ..... 5-8fn, 19, 27, 29fn 31fn

Warden v. Hayden, 387 U. S. 294 37

Wong Sun v. United States, 371 U. S. 471 42

PAGE

United States Constitution Cited

Fourth Amendment.....5, 5fn, 6, 7, 9, 26-30fn, 31, 35-37, 40-42

Fifth Amendment.....5, 5fn, 6, 8, 9

Ninth Amendment.....5, 8, 9

Statutes Cited

Alien and Sedition Laws..... 16

Hobbs Act 4

47 U.S.C. (Federal Communications Act):

Sec. 605 ..... 30fn

Rule Cited

Rule 42(2) 2

Texts Cited

Encyclopedia Britannica, Eleventh ed., article entitled "Jacobins", p. 117, fn. 1..... 32fn

Miguel de Cervantes, Don Quixote (Ozell's Revision of the Translation of Peter Motteux (1930):

pp. xx-xxi 21fn

IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 46

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES A. WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICI CURIAE* JOHN G. BROADY, SAMUEL DESIST, JACK A. PEARL, JOSEPH ALFRED TANNER AND RALPH TROPIANO, IN SUPPORT OF RESPONDENT JAMES A. WHITE

This brief amicus curiae, in support of the position of the respondent James A. White, is respectfully submitted by amici curiae John G. Broady, Samuel Desist, Jack A. Pearl, Joseph Alfred Tanner and Ralph Tropiano.

The Parties' Consent to the Filing of This Amicus Brief

This amicus brief is accompanied by written consent of the Solicitor General and of counsel for the respondent James A. White, pursuant to Rule 42(2).

The Interests of the Amici

Amicus John G. Broady is a defendant under several indictments now pending in the Supreme Court of the State of New York, New York County,* in which decision of the issues of the instant case by this Court will or may have a dispositive effect. (Broady is represented in those New York State proceedings by Maurice Edelbaum, Esq. (co-counsel for Broady in the within amicus presentation.) Broady's indictments include charges of violation of New York's anti-eavesdropping statutes. Broady, a private investigator, is charged in some of those indictments with having obtained investigative information by illegal use of electronic devices. The State charges against Broady were developed with the aid of informers who were equipped with "minifon"-type electronic recording devices in alleged conversations with Broady and with other persons. Broady's situation is thus closely comparable to that of the within respondent James A. White, as regards the question of whether use of the minifon (or Kel) type of electronic monitoring device taints prosecutive evidence thus obtained. The instant White case, and the case of amicus Broady, likewise commonly involve the question of whether, even if *Katz* v. *United States*, 389 U. S. 347, in the light of the "prospectivity" ruling of *Desist* v. *United States*, 394

* The indictment numbers are 4821-1/2-1966, 4822-1966, 4842-1966, 4843-1/2-1966 and 4844-1/2-1966.

U. S. 244, is not applicable to Messrs. White or Broady, nevertheless the electronic activity involved was unconstitutional by pre-*Katz* standards. The monitoring of White took place in December 1965-January 1966. The monitoring of Broady is believed to have taken place at least in part during the second half of 1966. Broady has duly preserved, in the State proceedings, the federal constitutional issues here involved. He has not yet been brought to trial on any of the aforesaid indictments.

Amicus Samuel Desist was one of the unsuccessful petitioners in *Desist* v. *United States*, 394 U. S. 244, rehearing denied —— U. S. ——, 23 L. Ed. 2d 251, where *Katz*, *supra*, was held applicable only to police electronic activity occurring after the date of decision of *Katz* (December 18, 1967). Had *Katz* been held applicable to the *Desist* case facts, the federal narcotics convictions in the latter case would have fallen (the Government so conceded in the *Desist* argument). If the instant *White* case should produce a ruling that the non-trespassory electronic monitoring of Mr. White was illegal but for the problem of "retroactivity" of *Katz*, the forthcoming decision in *White* will necessarily deal also with either the *Katz*-retroactivity problem or with the problem of illegality of non-trespassory electronic activity under pre-*Katz* standards. Amicus Desist has a vital interest in the latter branches of the *White* case issue structure. And it seems realistic to expect the possibility of a *de novo* examination of the retroactivity problem by this Court in view of Mr. Justice Harlan's statement in his dissenting opinion in *Desist*, *supra*, that "Retroactivity must be rethought"; cf. Mr. Justice Harlan's statement in his dissenting opinion in *Jenkins* v. *Delaware*, —— U. S. , 23 L. Ed. 253, 262, that "* * * the time has come for us to take a fresh look at the whole problem of retroactivity". (Undersigned amicus counsel Abraham Glasser

argued the *Desist* case in this Court for all of the petitioners.)

Amici Jack A. Pearl and Joseph Alfred Tanner were convicted on June 16, 1969 in the United States District Court, N. D. Ill. (Marovitz, J., and a jury) on charges of labor-dispute violence (Indictment no. 67 Cr 30). Their case is pending on appeal in the Seventh Circuit. The case involves issues of minifon-type monitoring similar to that in the instant *White* case; the electronic activity alleged by Pearl and Tanner pre-dated *Katz*. The electronic issues in the Pearl-Tanner case were duly preserved before and during trial. The Pearl-Tanner case also involves telephone surveillance similar to that in *White*, and these issues too were duly preserved. (Undersigned amicus counsel Abraham Glasser and Maurice Edelbaum represent Pearl and Tanner in the pending appeal in the Seventh Circuit, and were of trial counsel.)

Amicus Ralph Tropiano was convicted in December 1968 in the United States District Court, D. Conn. (Timbers, C.J. and a jury), of Hobbs Act extortion (Indictment, Crim. No. 12,201). The Tropiano case involves issues of minifon-type surveillance as well as telephone surveillance similar to those in *White*, all of which issues were duly preserved on Tropiano's behalf at the trial. The electronic activity in the Tropiano case took place in March and April, 1967 (pre-*Katz*). The Tropiano case is pending on appeal before the Second Circuit; it was argued July 24, 1969. (Undersigned amicus counsel Abraham Glasser is Tropiano's attorney in the appeal before the Second Circuit.)

In view of the existence in all of the above cases of electronic issues similar to those in the instant *White* case, and in view of the fact that undersigned amicus counsel Messrs. Edelbaum and Glasser respectively represent the

above named amici in their own respective cases and may be in a position to make an amicus briefing contribution in the instant *White* case, we (Messrs. Edelbaum and Glasser) sought and obtained the consent of the *White* case parties for the filing of this amicus brief; in our letters to the Solicitor General and to Mr. White's counsel requesting such permission, we presented substantially the foregoing facts.

Summary of Argument

The within amici curiae argue in this brief (1) that the uncompromisable supremacy of the social-constitutional value of individual human privacy against police electronic intrusion requires a ruling that the Fourth, Fifth and Ninth Amendments absolutely outlaw all such police activity for prosecutorial purposes, including so-called one-party-consent electronic monitoring; and (2) that, regardless of any retroactivity-prospectivity impingements as such, the judgment below should be affirmed either because *Katz* v. *United States,* 389 U. S. 347 and *Osborn* v. *United States,* 385 U. S. 323 govern this case and need no "retroactivity" holding here because those decisions merely applied pre-existing law of the Fourth Amendment, or because in any event the above-mentioned social-constitutional "value judgment" in favor of privacy *now* compels the same result irrespective of precedent.

ARGUMENT

Introductory to Argument

The Seventh Circuit decision in this *White* case attainting one-party-consensual* electronic monitoring may well

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* We are aware that respondent White herein challenges the constitutional adequacy of the Government's record-showing of "consent" by the informer, and we agree with respondent. Our own presentation in this amicus brief proceeds mainly on the *arguendo* assumption that such informer-consent is adequately established, but we also submit that the doubts as to such "consent" in this case must affect the ultimate disposition of the Fourth and Fifth Amendment issues herein.

stand solitary of support in other federal appellate jurisdictions as the Government claims (Brief For The United States, in *U. S.* v. *White,* No. 46, p. 20, n. 5).* Nevertheless, the vagaries of constitutional litigation have now brought it about that even though heretofore there has appeared to be small chance of a grant of certiorari to test out this one-party-consent issue at the behest of a criminal-defendant certiorari-petitioner, the issue has now been accepted for consideration on the merits by this Court at the behest of the Solicitor General in this *White* case, where the Seventh Circuit has administered to the Government its apparently solitary appellate rebuff in this area of electronic monitoring.

Now that this issue is before the Court on the merits, it is well to begin by noting exactly how this *White* case issue stands in the overall relevant constitutional perspective of the Fourth-Fifth Amendment "electronic" developments of the past few years. *White* poses, in one ultimate form, the constitutional policy question of individual human privacy *versus* governmental electronic intrusion. The *White* issue is "ultimate" because of the one-party consent factor. *Silverman* v. *United States,* 365 U. S. 505, and *Clinton* v. *Virginia,* 377 U. S. 168, settled that electronic monitoring done through "trespass" or in a "constitutionally protected area" violates the Federal Constitution. *Berger* v. *New York,* 388 U. S. 41, settled that advance judicial orders permitting eavesdrops of the latter categories must comply with the Fourth Amendment.

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* But see *United States* v. *Missler* (C. A. 4, decided August 25, 1969—Sobeloff, J.), 5 Criminal Law Reporter 2405, September 3, 1969, referring to this one-party-consent issue and stating that "This debate is likely to remain unresolved until the Supreme Court furnishes additional guidance. In this regard, we note that certiorari has been granted in White. * * *"

Katz v. *United States*, 389 U. S. 347, eliminated the tests of "trespass" or of "constitutionally protected area", and ruled that the Fourth Amendment applies to any electronic auditing by "the uninvited ear" regardless of place. What gives this present *White* case its "ultimate" character is that the *White* facts—like the facts in the cases of all of the within amici (except amicus Desist)—present the question of whether monitoring done with the aid of some form of "one-party consent" falls within the *Katz* ban against "the uninvited ear".

We see several alternatives for approaching this one-party consent issue:

(1) *Berger, supra*, may be read as having set up Fourth Amendment tests for eavesdrop "warrants" which would practically make such "warrants" impossible to obtain. However, *Katz*, we realize, apparently contemplates the practical feasibility of such warrants—and pre-*Berger* the Court had approved *ad hoc* one such warrant, in *Osborn* v. *United States*, 385 U. S. 323.* Nevertheless, there is one way in which the situation as of the time of *Berger* may now again become relevant for consideration. We refer to the fact that in *Berger* the petitioner Ralph Berger had asked this Court to outlaw any and all electronic monitoring except in cases of extremest public emergency and even then to outlaw it for prosecutorial purposes (*Berger* v. *New York*, No. 615, Oct. Term 1966, Brief For Petitioner, pp. 15-51). The Court in *Berger* did not adopt the latter suggestion, nor has the Court pursued that direction since *Berger*, but we (the amici herein) now respectfully urge renewed consideration of this approach, and we present argument in support thereof in our Point I, *infra*.

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* We discuss the *Osborn* case more extensively *infra*.

POINT I

Individual human privacy has or should have the supreme value in humanistic, democratic society of the modern western type. This "value judgment" should be made controlling, as a matter of constitutional policy, in all cases of governmental electronic intrusion against private individuals. Except perhaps for situations of supreme public necessity involving the physical safety of the nation or of a particular populated community or vital public installation, and even then only for purposes of preventive security action by responsible governmental agencies at the highest level rather than for obtaining of prosecutorial evidence, no electronic eavesdropping—including methods involving no "tangible" physical intrusion in the conventional senses, and including so-called one-party-consent intrusions—can be constitutional under the Fourth, Fifth and Ninth Amendments.

(As stated at p. 7, *supra,* the present amici are renewing in this brief the argument of petitioner Ralph Berger in *Berger* v. *New York, supra,* which is summarized in the above point heading. Our ensuing argument on this point is taken largely (and substantially *verbatim*) from the Brief For Petitioner in *Berger,* pp. 15 et seq., *passim;* undersigned amicus counsel Abraham Glasser wrote the *Berger* brief, so while we may here be burdening the Court with a repetition, we are not plagiarizing.)

The "Philosophy" Of Electronic Eavesdropping And The Constitutional Values Which It Challenges Even When It Is Done With So-Called One-Party Consent.

It has been well said that our constitutional search and seizure provisions "did not confer a right upon the people. * * * The right guaranteed was a right already belonging to the people. It was a precautionary statement of a lack of federal governmental power, coupled with a rigidly restricted permission to invade the existing right. * * * To view the amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitations thereon." *District of Columbia* v. *Little*, 178 F. 2d 13, 17 (C.A. D.C., 1950), aff'd 339 U. S. 1.

In other words, it is not, in any particular instance, the right to be let alone in one's privacy which has to prove itself as against offered intrusion; it is, rather, the searcher's or demandant's intrusion which has to be shown to be justifiable as against the traditionally, nay the axiomatically presumed "right of the people to be secure in their persons, houses, papers, and effects." U. S. Const., Amdt. IV.

So fundamental to our democratic-humanistic system is the right of individual privacy that, willingly facing a possible taunt of Transcendentalism, the constitutional lawyer may venture to characterize the right of privacy as "pre-constitutional", or "supra-constitutional".

The right of the individual to be free of unwarranted police intrusion against his privacy does not always receive, in practice, the protection which its express constitutional character (not to say its "pre-constitutional" character) would seem to require. The scope and the connotations of this right are matters of widespread and intense

controversy at the present time perhaps more than ever before, as the competing claims of the apace-advancing technology of electronic spying are pressed by proponents of police authority. The instant case brings this controversy before this Court in an issue-setting which, as above said, poses the constitutional problem of electronic eavesdropping in the most ultimate form in which it has thus far come before this Court, *viz.*, one-party-consent eavesdropping done without a judicial "warrant".

The circumstance that at a particular juncture in constitutional history a fundamental precept of the Constitution is under strong attack may reflect either that the evolving character of the Constitution is readying for a wholesomely needed mutation or variation, or that a wholesome constitutional stability as to the matter in question is being threatened and that steadfastness is needed to repel the threat. At such crucial junctures in this country's history it has more than once been the special responsibility of this Court to try to determine correctly, for the good of the Nation, which of the alternative dynamics just mentioned is operating in the particular confronting situation.

There is perhaps a still profounder way in which one may understand how this Court's unique role may be called into functioning at these supreme junctures in the continuing course of our constitutional evolution. One may speak of two classes of great constitutional "verities" under a system of our American type. First, there are those great constitutional "verity" rules which at some fairly defined point in time may be said to have attained their maximum fulfilled *vitality*, as an accomplished constitutional and social fact, through the decisional pronouncements of this Court in the first instance and through their subsequently having become accepted

as a practical working reality throughout the country at large. Second, there are those other likewise great constitutional "verity" rules, affecting matters which may be equally as important as those involved in the rules of the first class just mentioned, but which are still evolving, both as to the form and the firmness of their enunciation by this Court and as to the extent of their practical acceptance by the country.

The rules of the first class, the great constitutional "verity" rules whose axiomatic acceptance has become an accomplished historical fact in the country's life and thought, have always been most rare when what was involved was some really basic question of social "value judgment", and even rarer when the "axiomatic" value judgment involved has embraced some really integral matter of social ethics or social philosophy, i.e., when what was at stake has been the basic constitutional arrangements for administering the relationship between government and individual in the interests of either preserving or changing the essential "power" structure of the country's social system or its attendant system of moral assumptions—in a word, when what has been involved is that ultimate polity choice, Liberty or Authority.

The rarity of this kind of universally accepted social-governmental "value axiom" is, of course, a fact not confined to the scene of our own constitutional history. The instances in history generally, or, more pertinently, in the history of modern Western man, in which the ultimate consensus of an informed democratic citizenry has produced virtual dogma-accepted unanimity on any such fundamental question of value judgment in matters of liberty-versus-authority may probably be counted on the fingers of one hand.

One such instance which comes to mind is the apparent consensus of decent mankind that human chattel slavery is wrong. Another instance, in our own constitutional system, is that criminal prosecution and punishment without judicial trial are wrong.

It is difficult to think of other examples of social "dogma" in matters of individual constitutional right that enjoy practical unanimity or undisputed acceptance even among democratically organized peoples like ours who operate under a system of constitutional limitations imposed upon a theoretically *plenary* "parliamentary sovereignty". That is, aside from the two instances above mentioned—abolition of slavery, and the right of judicial trial on a charge of crime—it is difficult to think of any other constitutional rights of the individual as to which significant opposition is practically non-existent. In this country no serious person, or no person worth being seriously listened to, stands up any longer to favor slavery or criminal punishment without trial.

On the other hand, restrictions or qualifications continue to be favored in more or less significant and responsible ways as regards other individual rights usually thought of as basic. Even the principle of universal adult suffrage, the supposed *sine qua non* of democracy and of its sister doctrine popular sovereignty, has never ceased to be directly or indirectly resisted, and from time to time rendered *pro tanto* ineffectual, at the hands of influential elements in the modern democratic nations. One may likewise think of other examples among our theoretically basic constitutional principles which deserve or may deserve total acceptance and total effectiveness but do not yet unqualifiedly have such status and effect as a practical matter—e.g., free speech and free press, unqualified freedom from racial discrimination, and unqualified freedom from compul-

sory self incrimination (as against the compulsions of "immunity" laws); even freedom of thought in matters of religion (or irrelegion) is far from having achieved total success against openly declared bigotry and ignorance.

Few indeed, then, in history have been the "social truths" of individual right whose unquestioned acceptance "all mankind cries out with one voice". And the short list of these universally accepted examples above suggested—again, we were not able to enlarge our list beyond the two unqualified examples given, involving slavery and criminal trial—has been the product of long evolution, an evolution moreover whose course in this country has indispensably needed spur and guidance from this Court.

We respectfully believe that the present case involves a social and constitutional principle of individual right which deserves to rank, in the Bill of Rights area, with the principles of abolition of human chattel slavery and the right to due process judicial trial before criminal conviction and punishment. In this matter of the right of individual privacy against improper police intrusion there is no more room, under our constitutional system, for arbitrary and secret use of governmental power, than there is room for instruments of "title" to or "conveyance" of human slaves, or for *lettres de cachet* or Star Chamber proceedings as "process" for criminal punishment.

At the very least, we submit that socially and constitutionally equal with these latter values (against slavery and arbitrary criminal punishment) is the value of the right of individual privacy against any conceivable intrusion except upon grounds shown in a conclusive and cogent way to be of the most uncompromisable necessity for the very existence and safety of the community.

It unfortunately tends to be easy, in particular social times and circumstances, to fall into a short-sightedness concerning the high value of individual privacy when challenged by assertions of "police" need. It is a commonplace idea, declared by wise minds many times in the history of human thought and human strife, that such short-sightedness or impatience in matters of liberty *versus* authority are a foremost peril to public morality and good social sense. This country at the present time is grappling in manifold ways with stresses of public morality and sensible social judgment to an extent probably unprecedented in our history. A principal area of these stresses involves the national "crime problem", or the concomitant problem of effective "crime-fighting" by police agencies. Unfortunately, this situation which, despite the unusual magnitude of crime incidence at present, might normally have a chance of being soberly regarded and administered in an enlightened manner by agencies and persons of good will, as a specifically defined problem of enforcement of criminal laws, has been tensionized far beyond sobriety and normality in the present-day national attitude by aggravations for which no one is to blame unless it can be said that History is to blame for man's woes or for particular intensifications thereof. The increase of population on the geometrical scale set by an implacable biology, the consequent sheer crowding in our massive urban environments, the continuing disparities between wealth and poverty, the corroding of individual character qualities as traditions give way to Science (or, all too often, to mere scientism), and perhaps above all the explosive dynamics of race as groups long resignedly subservient emerge into activism for good or ill—these are among the major factors which are hampering a sober and normal approach to the current "crime problem". Social historians would doubtedless add also the factor of

mass-and-individual personality stress, if not disintegration, which arises in an era like the present when physically violent strife occupies so large a portion of the mental and physical energies of even the most advanced nations through the instrumentality known as War.

Nor must it be forgotten, in this recital of the items upon which we ought all to reflect in trying to understand the present day issue of crime-fighting *versus* the Constitution, that the historical juncture in which we stand in this year 1969 is but relatively a moment removed, even in short range historical measurement, from that recent time when, as an entire nation, we succumbed to a shame for which the only "precedent" in our history is the episode of the Alien and Sedition Laws. The departure from law and steadfast democratic tradition which is inherent in manifestly oppressive methods of law enforcement is so fundamentally shocking that it is perhaps in the very enormity of this shock that we must search for explanation of the astonishing indifference and insensitivity which so much prevail in some quarters of this country today concerning these matters. That certain Catalinian species of United States Senator who briefly held this country in terror and in thrall but a decade and a half ago did not fail of his purpose entirely, if we are correct in suggesting that the anti-rational and the anti-traditional precepts of constitutional immorality which at that time were infused into the minds of the citizenry are continuing to disorder the thinking of many people and to make it difficult to conduct temperate and rational debate on the contemporary constitutional issues of criminal law enforcement. We have no wish to draw the busy attentions of this Court into a re-living of the execrable days of the early 1950's in the respects to which we are here alluding, but we do not think that in connection with the present day

proposals for an unleashing of the "constitutional" Bloodhounds of electronic surveillance, it is important to remember those days and how their unwholesome effects continue to this time. It was in those days, not very long ago, that a visitor coming upon our scene could have readily imagined himself viewing a people gathered in a Colosseum to applaud the savagery of the Sovereign himself, as a people once applauded a Commodus.

If we may carry one step further the figure of speech just suggested, and in the same ancient language which framed and expressed the thought of the sometime noble thinkers of that sometime splendid bygone Civilization, one good way of expressing what this country needs today in the face of the police challenge to the right of individual privacy by electronic intrusion, is that this country would do well to hold in mind those ancient and grand words "*sub specie aeternitatis*". In a democratic society which professes fidelity to the principle of a written Constitution containing a Bill of Rights, in a country which affirms or professes to affirm the values connoted in such a constitutional charter of individual human liberties, the last thing that should be countenanced is, as we suggested at the outset of this Point I, an attitude of historical short-sightedness or impatience that might and probably must endanger the ancient verities and values codified in our Constitution as to the relationship between limitedly empowered government and the free citizen. Seldom if ever in our constitutional history has there been a more fitting and indeed a more necessitous occasion for conducting our constitutional discourse *sub specie aeternitatis*, than in the present debate over electronic police spying in derogation of the right of individual privacy.

* * *

In its brief on the merits in the instant case (Brief For The United States, p. 22), the Government argues that one-party-consent electronic monitoring of the type here involved "is usually limited to a discrete transaction and can reach only those conversations to which the informant is privy. There is also little likelihood that an individual will discuss confidential personal matters with an informant who is simply attempting to make an illicit purchase of narcotics."

A similar argument was offered by the respondent State authorities in *Berger* v. *New York*, *supra*, where they sought to justify the intrinsically unlimited character of the "search" involved in electronic room-eavesdropping by the analogy of the police searcher who must sift through innocuous materials in order to find the "specific" items allowed by the search warrant.

This amounts to suggesting that private individuals should accept the company (undisclosed and furtive) of police electronic auditors because the police eavesdroppers will be cocking their ears or animatedly alerting themselves only for "crime" during the auditory surveillance. This idea finds "precedent" in one "authority" that has come to our attention, namely, the late George Orwell's "1984", where everyone's home contained visual and auditory electronic installations by which "Big Brother" could keep himself continually apprised of all or any happenings in the private premises of the citizenry.

Indeed, the "Big Brother" system of "1984" was, in one pertinent analytical sense, less constitutionally pretentious (and offensive) than our contemporary one-party-consent system. In "1984" *everyone*—"Big Brother", all of his police henchmen, all informers, and all "subjects", in short everybody in the world—*knew* that the all-pervasive elec-

tronic surveillance was going on. Anything that anyone said in "1984" was, therefore, "consented to" by everyone for electronic auditing by "Big Brother". Thus, in "1984" there was not only "one-party-consent", there was *all-party*-"consent". Of course, this all-party-consent of "1984" was *coerced*, by the totalitarian coercions of that society. But what of the *coercion* in this present *White* case. Not only does the record disclose *zero* as to any supposed "voluntariness" of the "one-party-consenting" police informer, but (unlike "1984") the record here absolutely *negates* any such "consent", or even "knowledge", by the victim (Mr. White).*

It is worth examining in a little more detail the astounding suggesting that the private citizen ought not to mind living his private life under the potential, ever overhanging, "discrete" one-party-consent presence of the electronic police eye and ear, because in that way "crime" may be better detected. Who among us would *knowingly* accept such an atrocious invasion of our private homes and business places? Who among us would be consoled, in accepting such an insulting and intolerable intrusion upon our private lives, by the reassurance that the secret eavesdropper's attention would not be focused upon us in a "specific" way until we spoke a "criminal" word or did a "criminal deed"?

The foregoing is, in effect, the Government's own choice in this case, as to the best means of formulating the argument in favor of the electronic "one-party-consent" pretensions of the contemporary American police mentality. This draws the issue with unmistakable clearness. It is the issue of whether higher value attaches to individual

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* Of course the same is true of all of the within amicus curiae victims or "subjects".

right and freedom in our society, or to the interests of police enforcement of the criminal laws. The extreme logic of the position preferred by the prosecutive authorities in cases like this one—that policing comes ahead of human private dignity—is in fact to be welcomed, because it shows to us, to all of us, to Judges and to lawyers and to laymen, where all this leads. We, respectfully say that where "all this leads" is, literally, to "1984".

Nowadays the literary image "1984" tends to obtrude beyond the realm of literature and to haunt men's minds as a day-to-day life reality the closer we approach in actual time to that dread "1984" year of Orwellian portent which now, in this year 1969, is a scant decade and a half away. Just how short a decade and a half can be in the time-experiencing consciousness of a human adult, especially in this pell-mell era, is acutely borne in upon us when we reflect that the *past* decade and a half started "only yesterday", in the year 1954, the but-yesterday-gone climatic year of "McCarthyism", the still freshly-felt first significant year of the "Warren Court", the year when we were all only fifteen years younger than we are now—and who of us, Judge or lawyer participating with each other in this present discourse, can avoid the poignant awareness that we would be hard put to it to tell ourselves satisfyingly that the last decade and a half of our lives felt like a long span in our lifetime, or that the next decade and a half will have for us a feeling of substantial span in lifetime terms?

Fain though we all be to say so, we all know we must eschew saying "Backward, O' backward go time in thy flight". But we also all know that "no power under Heaven" can thwart a *resolute* man from freely *determining* his own *volitional* part in the Future, as innumerable resolute men have done throughout history, and whose

creed in this regard was perhaps most tersely expressed by Martin Luther ("Here I stand. I can do no other".). The Justices of this Court are today the most important individuals on this planet for the fulfillment of this resolute volition to save mankind's future from the rule of the Electronic Brute.

We (undersigned amicus counsel) do not ask pardon for our foregoing rhetoric. Before this Bench one need never apolize for speaking on a plane *sub specie aeternitatis*. The very *raison d'etre* of a constitutional republic is its faith in eternal verities. And since the time of the Bill of Rights and the establishment of Judicial Review in *Marbury* v. *Madison*, 1 Cranch. 137, the humanistic verities expressed in the Federal Constitution have been a special charge of this Court.

We offer next some additional suggestions in support of the theme that the eternal Verity affirming the supreme Value of human individual privacy, is strikingly confirmed by the physical facts of Man's place in Nature:*

Whether or not one adopts a teleological view of the Universe, or of the place of Homo Sapiens in it, there are

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* We might have mentioned at an earlier place in this pretentious-sounding argument on the "philosophy" of electronic spying, that we surely do not presume to stake out any claims of originality (in the sense of first discovery) in this essay treatment of the subject. And if this essay treatment of ours is lacking in scholarly annotations, it is not because we wish to deprive the Court of "research" leads, but because the topics being treated are of such a nature that scholarly annotation thereof would smack of pedantry. What we are trying to say in this footnote was much better said in Cervantes' preface to *Don Quixote*, where the author lamented that he might be charged with offering to the world nothing "but a dry, insipid Legend, not worth a Rush * * * without either Quotations on the Margin, or Annotations at the End, which other Books * * * have to set them off * * *. I want all these Embellishments and Graces * * *. I do not so much as know what Authors I follow * * *. [B]esides I am naturally lazy, and love my Ease too well to take the Pains of turning over Authors for those Things which I can express as well without it." *Miguel de Cervantes, Don Quixote (Ozell's Revision of the Translation of Peter Motteux)*, pp. xx-xxi (1930).

physical and physiological facts as to the nature of the world and Man's place in it which must be taken into account in any thoughtful consideration of the ultimate meanings of electronic intrusion upon individual human privacy. Aside from claimed instances of what has come to be known as "ESP", each member of our biological species goes about the daily course of his life pretty effectively secure in the knowledge that none of his fellows can probe his own secret mind. This opportunity which each human individual enjoys for preserving his inner autonomy of psyche or "soul" except as he voluntarily chooses to disclose it to or share it with others, is, in functional biological terms, the basis that enables each person to preserve his ultimately unassailable individual privacy if he has the wish and the will power to do so.

Teleologically considered or not, as we above suggested, this always invokable invulnerability of the private human mind, is a fact which intrinsically prevents or can prevent, in any instance, an unwanted intrusion upon one's individual privacy of mind or soul. Of course, we have now the atrocious phenomenon of chemistry known as the "truth drug"—atrocious, that is, when it is forced upon an individual without his free consent—but the atrocity of compulsory administering of a "truth drug" is something that we all know will never be countenanced in this country "while this Court sits". So that, it may be stated as a self-evident fact of human physiology and constitutional law that in this country there is no mortal power which can legally compel an unwilling individual to surrender the secrecy of his mind.

Why is not the situation exactly the same in regard to the physiological facts which nature has laid down in connection with the human sense organs of speech and hearing (and sight)? Absent artificial aids to the senses of

hearing (and sight), it has been from the beginning of man's existence a matter of sure knowledge on the part of each human individual that there are available to him fairly ready means of guarding his privacy of speech (and visibility) against unwanted intrusion. The person who does not want others to hear what he is saying (or to see what he is doing), has always been favored by an apparently wisely ordered Nature with easy facilities for preventing such intrusion—always, that is, until the advent of the technological spying devices of the present era which has given us electronic auditory methods, infra-red and photographic visual methods, and no one knows what other methods may be presently under way or may be yet to come as the ingenuity of science may contrive. Free of these technological espionage devices, an individual always could, and still can, preserve his privacy of speech and visibility against unwanted intrusion by various simple physical means of self-protective withdrawal or enclosure. But no such withdrawal or enclosure can necessarily avail against the insidious penetrations of today's electronic spying devices (or of the infra-red and photographing devices mentioned).

It is our respectful contention that any constitutionalizing of police-spying devices which would set at naught the physical and physiological boundaries that the facts of the natural world and of man's body have always provided as *ipso facto* protections for the ordinarily invulnerable privacy of each human individual, would involve so drastic, so far-reaching, so unpredictably destructive an overturning of the most fundamental arrangements for the ordering of decent human society, as to be unthinkable—not only constitutionally unthinkable, but above all unthinkable to anyone whose vision of Man is of a predominantly spiritual rather than of a predominantly material or carnal character.

Indeed, one does not have to be a teleologist avowing belief in man's destiny of progress or nobility, to be appalled at the threat of a technological obliteration of the protective arrangements that physics and physiology have formerly always assured in defense of the individual privacy of men's minds or souls. It is only necessary that one favor or desire, out of whatever existential or other philosophically arbitrary choice attitudes one may prefer, a continuation of the chance of each individual human being to go on having the effective right of private life, private speech and private thought which the natural facts of man's existence heretofore have made possible, to impel one into instantly and indignantly rejecting the idea of technological abolishment of the age-old privacy of the voluntarily controllable expression of one's vocal senses.

We have joined to our above discussion of the right not to have one's private speech electronically overheard, the theme of one's right not to be visually seen when one's preference of privacy is to the contrary. In thus enlarging the realm of our discussion, it has not been our thought, needless to say, to convey to this Court that we deem electronic eavesdropping to be inextricably bound up, for court decisional purposes, with all of those larger considerations of human sensory and mental privacy above mentioned. This case of electronic eavesdropping stands in the framework of its own constitutional issues. And yet, we have felt that, in the interests of a full exploration of the constitutional-philosophical connotations of the subject, it is our duty to speak in this brief along the broader lines above proposed.

In fact, it is because of our earnest belief that the specific constitutional problem which this case poses in regard to electronic eavesdropping, does unavoidably carry with it at least for purposes of larger perspective, the

epochally important topics of philosophical inquiry above sketched, that we suggested earlier in this portion of our argument that the ultimate issue of constitutional "value judgment" involved in this case of individual privacy *versus* police electronic spying is matched or surpassed in importance by perhaps only two other issues of constitutional "value" of the past, the issues of human slavery and of arbitrary punishment for crime.

* * *

The Government argues in this case—as do other contemporary proponents of one-party-consent electronic monitoring—that in the one-party-consent situation the problem is not unconstitutional invasion of privacy but "misplaced confidence". There are several answers to this.

First, what does the right of *conversational* privacy mean if it does not include the right to *converse,* i.e., to speak words *privately* to one or more other persons? Is the constitutional right of conversational privacy only the right to engage in a private soliloquy? We recognize that the possibility that the other party to a private conversation may later betray the speaker's "confidence" is just as much a reality of the life of man-in-the-physical-world as are the above mentioned nature-provided means for preserving one's privacy; we readily admit that the chance of such betrayal of confidence is as real a fact of life as are life's apparatuses for preservation of individual privacy when one wishes to do so. But, put an electronic "minifon" device on a police informer, and you have then and there stepped outside of both nature's provisions for preservation of solitary privacy and nature's tolerance for the predictable hazard of "misplaced confidence". Are the safeguards which immemorial nature has provided for the privacy of men's individual souls to

be allowed to be breached by new-fangled electronic mini-circuits and transistors? Shall this Court be remembered in future ages as the Body which had the power to refuse to allow enslavement of the human soul by electronic gadgetry but chose to let the police gadgeteers have their way?

Second, what, after all, is the known, predictable hazard of one's "misplaced confidence" in the situation above propounded? It is true that every criminal who deals with a confederate hazards that he is dealing with a then or future informer. This is a "known", "predictable" hazard for any criminal. Indeed it is a known hazard throughout all private conversational activity of men, non-criminal as well as criminal. It is one of life's most difficult arts to judge rightly whom to trust in imparting secrets, non-criminal or criminal. And it has ever been thus, since our species gained the power of speech, if not even in pre-speech times when men might communicate or manifest secret matters to each other by means other than "speech". But was it ever envisaged that the assumedly confidential listener acting as a then and there police agent, would actually *seize* the confidential words of the speaker by the means of an electronic *search? Is not this last the heart of the problem, the key to the analysis, of the one-party-consent electronic monitoring procedure?* Is not the dispositive *Fourth Amendment* consideration here that the so-called one-party-consenting *police agent* has been sent expressly to *seize* the confidential words of the speaker—to *seize* them on electronic tape or wire—and not merely to listen to the words with a view to later taking advantage of the speaker's "misplaced confidence"? Is it not the dispositive Fourth Amendment "constitutional fact" in such situations that the electronically equipped police agent has been sent by the police, *without any Fourth Amendment judicial warrant* (i.e., without de-

termination of probable cause by a judicial officer and without judicial specification of what is to be "searched" and "seized"), to carry out a *search* and a *seizure* of the Fourth Amendment-protected *speech* of a *person*—all in violation of the Fourth Amendment's protection of *"persons not places"* against the "uninvited ear"? In such a scene, is there any decently maintainable distinction, in Fourth Amendment terms, between (1) the police conduct of putting an "uninvited ear" electronic "bug" in a man's home or in his office or in his car or on top of a public telephone booth that he uses, and (2) the police conduct of sending to that man an electronically wired police agent or human "bug"? Is it not self-evident that in both of these forms of police conduct the ultimate result is to subject the unknowing, non-consenting speaker to the electronic "uninvited ear" of the police?

Third, in our preceding two paragraphs we have been speaking only of the "minifon"-type device, which records but does not transmit. Add to the foregoing that in this *White* case the device used was the Kel-type, which includes an electronic transmitter—add this, and you have for all practical purposes obliterated any meaningful remaining Fourth Amendment distinction between one-party-consent monitoring and the "uninvited ear". For, with the Kel device, the speaker whose private words are being electronically "searched" and "seized" is being surreptitiously subjected not only to the electronic equipment carried by the "misplacedly trusted" police agent, but he is also being then and there subjected to the surreptitious *presence* of the primary officers themselves who are listening in on the electronic transmission (and in all likelihood are furthermore electronically recording it). The Kel method of electronic monitoring renders the one-party-consent procedure the single most profound subversion of nature's above mentioned arrangements for both privacy and for limited tolerance of "misplaced confidence".

(We keep emphasizing the provisions that physical nature has made for the preservation of human individual privacy, because we are convinced (*supra*) that to destroy these natural arrangements would be to destroy human individuality itself.)

Fourth, if the "misplaced confidence" rationale has Fourth Amendment validity notwithstanding all of our above suggestions, then literally all and any kind of police electronic eavesdropping, "trespassory" or otherwise, has equal Fourth Amendment validity, all or any forms of the electronic "uninvited ear" have equal Fourth Amendment validity. For, the rationale in question says that a man's Fourth Amendment rights against electronic invasion of his conversational privacy are not violated when that man knows, or reasonably or predictably ought to anticipate the hazard, that he is being or may be electronically overheard. Well, in this electronic age, can any man claim "reasonable" or reasonably predictable expectation that he is not subject to some electronic monitoring, somewhere, sometime, including "trespassory" room-bugging and telephone wiretapping? This idea that we are not entitled to Fourth Amendment protection against electronic intrusion when we "reasonably" ought to know that somebody may be electronically auditing us, would be preposterous if it were not so abominable. This argument of the Government is one of those arguments that proves too much. The logical culmination of such an argument, or of the police procedures that eventually could evolve from the acceptance of such an argument by the Courts, is precisely that state of affairs in "1984" in which *everybody* has "knowledge" of "Big Brother's" universal electronic surveillance, *everybody* therefore who speaks in the environment of that known universal surveillance "impliedly consents" to be overheard, and everybody knows that the Fourth Amendment is dead—and that human individuality is dead.

POINT II

A. If *Katz v. United States*, 389 U. S. 347, is read as making the Fourth Amendment applicable to one-party-consent electronic monitoring of the type here involved, and if such applicability of *Katz* should be deemed nevertheless precluded in this case because of the "prospectivity" ruling of *Desist* v. *United States*, 394 U. S. 244, then the *Desist* ruling should be re-examined to determine whether the Court has dealt soundly with the the whole problem of retro-activity-prospectivity in the series of cases commencing with *Linkletter v. Walker*, 381 U. S. 618.

B. In any event, aside from problems of "retroactivity *versus* prospectivity" as such, *Desist* should be reconsidered in relation to *Katz* because *Desist* is unsound in failing to recognize that *Katz* applied pre-existing law of the Fourth Amendment.

C. In any event furthermore, the judgment in this *White* case should be affirmed on its particular facts—alleged one-party-consent monitoring by a Kel device*—on the authority of *Osborn* v. *United States*, 385 U. S. 323; and *Osborn* should be held to have applied the pre-existing law of the Fourth Amendment or, *via* a reconsideration of *Desist*, *Osborn* should be given "retroactive" effect.

The monitoring of the within petitioner White took place in December 1965-January 1966. *Katz* v. *United States*, 389 U. S. 347, was decided December 18, 1967. In

* We (amici) do not treat in this brief the additional monitoring of telephone conversations in this *White* case.

Desist v. *United States*, 394 U. S. 244, decided March 24, 1969, *Katz* was held applicable only to monitorings done after the date of the decision in *Katz* (December 18, 1967).

This Court's contemporary decisions on retroactivity-prospectivity commenced with *Linkletter* v. *Walker*, 381 U. S. 618, a Fourth Amendment case addressed to the question of the retroactive or prospective application of *Mapp* v. *Ohio*, 367 U. S. 643. In *Linkletter* the petitioner's case was not still pending on direct review when *Mapp* was decided. The holding of *Linkletter* was that the *Mapp* rule would not be given retroactive operation upon cases finally decided prior to the *Mapp* case, but the Court noted that in other cases it had in fact been applying the *Mapp* rule to cases still pending on direct review when *Mapp* was decided (381 U. S. at 622, n. 4).

After *Linkletter*, the next retroactivity-prospectivity decision by this Court in a Fourth Amendment case was *Desist*, dealing with the *Katz* rule,* and holding (as above

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* *Fuller* v. *Alaska*, 393 U. S. 80, allowing only prospective application to *Lee* v. *Florida*, 392 U. S. 378, was not on its facts a Fourth Amendment case. *Lee* involved State telephone wiretapping which was held to be in violation of the Federal Communications Act (47 U.S.C. §605). *Fuller* involved State interference with the rights (under the Federal Communications Act) of the sender of a telegram.

Furthermore, there is a very grave question as to whether the grant of certiorari in *Fuller* was jurisdictionally improvident, so that *Fuller's* prospectivity ruling as to *Lee* may well be lacking in authoritativeness; this was urged in detail by the petitioners in *Desist* in their printed Joint Supplemental Reply Brief, pp. 12-22. We now respectfully urge the Court to re-examine this serious problem of the authoritativeness of *Fuller*, and to re-examine the last-cited Joint Supplemental Reply Brief in *Desist*.

mentioned) that *Katz* applies only to monitoring done after the date of the decision in *Katz* (December 18, 1967).

Thus, the only two precedent-setting* Fourth Amendment retroactivity-prospectivity decisions rendered by this Court, *Linkletter* and *Desist*, reached widely divergent results. In between *Linkletter* and *Desist* came several retroactivity-prospectivity decisions not involving the Fourth Amendment, but elaborately glossing, re-glossing and variously re-casting the whole judicial philosophy of the retroactivity problem. *Tehan* v. *Shott*, 382 U. S. 406 (rule of *Griffin* v. *California*, 380 U. S. 263, as to prosecutor's comment on defendant's failure to take the stand held not applicable to cases no longer under direct review at the time of the *Griffin* decision, but noting that the *Griffi* rule was applicable to cases still pending on direct review at the time of the *Griffin* decision—see footnote 3 in *Tehan*); *Johnson* v. *New Jersey*, 384 U. S. 719 (holding the rules of *Escobedo* v. *Illinois*, 378 U. S. 478, and *Miranda* v. *Arizona*, 384 U. S. 436, not retroactively applicable to cases in which direct review had been completed at the

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* *Desist* was followed in *Kaiser* v. *New York*, 394 U. S. 280, decided the same day as *Desist* (March 24, 1969). The Government also suggests in its brief on the merits in this *White* case (*United States* v. *White*, Oct. Term 1969, no. 46, Brief For The United States, p. 29) that the *per curiam* affirmance in *Kaufer* v. *United States*, 394 U. S. 458, is likewise based on the *Katz*-prospectivity ruling of *Desist*, and we do not challenge this suggestion of the Government. We do respectfully challenge, however, the Government's further suggestion on the same page of its Brief just cited, that *Kaufer* gives precedental support to the Government's position on the Fourth Amendment merits (i.e., as distinct from the retroactivity problem) of the issue of one-party-consent monitoring. The only arguably indubitable "holding" that can be spelled out of *Kaufer* is the *Desist*-based prospectivity ruling regarding *Katz*.

respective times of those decisions, and holding those decisions applicable only to cases where trial commenced after the respective dates of those decisions); *Stovall* v. *Denno*, 388 U. S. 293, holding the "line-up" identification rules of *United States* v. *Wade*, 388 U. S. 218, and *Gilbert* v. *California*, 388 U. S. 263 prospectively applicable only to confrontations conducted after the date of the *Stovall* decision—this was the first emergence of the pure or "all-out" prospectivity rule); *Roberts* v. *Russell*, 392 U. S. 293 (holding retroactive the rule of *Bruton* v. *United States*, 391 U. S. 123, as to co-defendants' confessions); *DeStefano* v. *Woods*, 392 U. S. 631 (holding that the State jury trial rules of *Duncan* v. *Louisiana*, 391 U. S. 145 and *Bloom* v. *Illinois*, 391 U. S. 194, were prospectively applicable only to trials commenced prior to the date of the latter decisions); *McConnell* v. *Rhay*, 393 U. S. 2 (holding retroactive the rule of *Mempa* v. *Rhay*, 389 U. S. 128, that there is a right of counsel at probation revocation proceedings). Cf. (post-*Desist*), *Jenkins* v. *Delaware*, —— U. S. ——, 23 L. Ed. 2d 253, holding the *Miranda* rules inapplicable to re-trials commenced after the date of the *Miranda* decision.

In the retrospect of the above series of decisions from *Linkletter* to *Desist* and *Jenkins*, it is no wonder that Mr. Justice Harlan has protestingly stated, "Retroactivity must be rethought" (dissenting in *Desist*), and that "• • • the time has come for us to take a fresh look at the whole problem of retroactivity" (dissenting—*Jenkins* v. *Delaware, supra*).•

• In all respectfulness:—The marvel of this Court's doctrinal and formulary peregrinations through the labyrinth of "retroactivity", recalls the sense of marvel expressed in the words of Pere Gerard, the homespun sage of the French Revolution, who one day said to a gathering of his Jacobin Club colleagues, "When I first sat among you I heard so many beautiful speeches that I might have believed myself in heaven, had there not been so many lawyers present." *Encyclopedia Britannica*, Eleventh ed., article entitled "Jacobins", p. 117, fn. 1.

In the *Desist* case briefs for the petitioners in this Court undersigned amicus counsel Mr. Glasser presented extensive argument on the retroactivity problem that commenced with the *Linkletter* decision. We respetfully ask the Court to refer to those *Desist* briefs (*Desist* v. *United States,* Oct. Term 1968, no. 12, Joint Brief And Appendices For Petitioners (captioned as no. 909, Oct. Term 1967), pp. 51-89; *id., Joint Reply Brief For Petitioners,* pp. 2-19; *id., Joint Supplemental Reply Brief For Petitioners,* pp. 3-28; *id.,* Petition For Re-hearing, pp. 1-9, 10-11). We are presuming to ask the Court to examine the last-mentioned *Desist* case papers because those papers are believed to contain considerable analysis and discussion of authorities which are probably not available elsewhere, which are prodigiously too lengthy to repeat here or even to summarize effectively, and which could be helpful to the Court if the Court is disposed at this time to respond to Mr. Justice Harlan's call (*supra*) that "Retroactivity must be rethought".

Cardinal in the above mentioned *Desist* papers on the retroactivity problem were the following:

(1) When this Court announces a new rule of constitutional protection for criminal defendants the Court is necessarily saying that that is what the *Constitution itself* requires. Unless such newly announced constitutional interpretation is made "retroactively" applicable to all persons wronged by the prior constitutional interpretation (including even post-conviction applicants—see, again, Mr. Justice Harlan's dissent in *Desist*), the Constitution itself is being denied *prospective* application, and instead only the pronouncement of this Court has operative lefal effectiveness, not the pronouncement of the Constitution, which is instead being declared by this Court to be retroactively null and void. The essential point of constitutional analysis here is that in a governmental system like ours *legislation* must always be given

prospective effect, and the Constitution, being the highest form of "legislation" in this country, must be given "prospective" effect *from the time of its enactment* or from the time of enactment of any of its amendments. So that, when this Court announces the meaning of a provision of the Constitution, that meaning must be treated as having always rightly been such, during all the times that prior unfortunate persons had been denied the benefits of such meaning of the Constitution as *legislation* which has always been operative *ab initio* in accordance with its proper meaning, no matter how tardy this Court may have been in arriving at such proper meaning. For, to rule otherwise is not only grotesque in point of sheer constitutional-"legislative" theory, and is not only something that smacks of a form of "*ad hoc*"-ism bordering on opportunism, but is cruelly unjust and inhumane in terms of fundamental due process.

(2) This "ad hoc"-ism in the Court's retroactivity-prospectivity approach commencing with *Linkletter* is bad for the whole Public Morality of the country and for the character-fortitude of the Bench and Bar in this country, because, aside from its inhumaneness to individual litigating victims, it infuses into the functioning of this country's legal system, at the level of the Highest Court of the Land, an amorality (well intentioned but nonetheless an amorality) that defies the root principle of a civilized legal order, the principle of A Government Of Laws And Not Of Men. This peril, which, we repeat, we know is unintended by this Court needless to say, is not assuaged by its unintended nature, for, as Talleyrand once exclaimed, "Worse than a crime, a blunder".

(3) At the very least, a newly announced interpretation of the Constitution, for criminal cases, should be applicable to cases still in the process of pre-trial, trial or direct review, as was allowed by the Court when it first

commenced its recent retroactivity-prospectivity thinking in *Linkletter*. The "cost" to society through disruption or burdensomeness in allowing such still pending cases the benefit of the newly announced rule is insignificant when compared with the social cost of disintegration of the national Public Morality and the character-fortitude of the citizenry when amoral *"ad hoc"*-ism becomes "respectable".

(4) In any event the *Katz* case, as well as the *Osborn* case, should be construed as having applied the pre-existing law of the Fourth Amendment, *i.e.*, the problem of "retroactivity-prospectivity" is not necessarily apt to the *Katz-Osborn* rulings.

For all of the above enumerated topics which were extensively briefed by the petitioners in *Desist, supra*, except for the last of those enumerated topics (item "(4)"), we must here rest on those *Desist* papers, for the reasons above stated. But as to the above item "(4)", we submit further as follows:

As to the *Katz* decision, which was held purely prospective by the *Desist* decision, the herein relevant problem is, just when did the Fourth Amendment principle of *Katz* first really become articulately formulated in the decisions of this Court and just when did it receive authoritative or effective acceptance in the decisions of this Court? Is it correct legal history to say, as the *Desist* decision says, that the unqualified Fourth Amendment "uninvited ear" rule of *Katz* had not been effectively established in the decisions of this Court prior to *Katz*? We respectively take the position that *Katz* should be read as having made no significant innovation in the pre-existing law of the Fourth Amendment. There are overwhelming indications in the *Katz* decision that, already "built into" the language of that decision, so to say, is the assumption that the pre-existing law of the Fourth Amendment required the *Katz* ruling.

For example, see the Court's rejection in *Katz* of the Government's argument that because its agents had relied on *Olmstead* v. *United States,* 277 U.S. 438 and *Goldman* v. *United States,* 316 U.S. 129, the Court should retroactively validate the agents' conduct, the Court stating, "That we cannot do. * * * [T]he inescapable fact is that" the agents had chosen to decide for themselves, rather than presenting to "a neutral magistrate", the agents' claimed belief that they had probable cause to conduct their electronic activity.

It is strikingly pertinent to this last quoted language of the Court in *Katz,* that in the oral argument in this Court on October 14, 1968, in *Butenko* v. *United States,* No. 197, as reported in 4 *Criminal Law Reporter* 4053 (October 23, 1968, Vol. 4, No. 4, Section 4), the following described colloquy took place between the Chief Justice and the Solicitor General:

> "The Solicitor Genueral commented that in Katz, the electronic eavesdropping was legal at the time it was done.
>
> The Chief Justice noted that if that was true it would have been likely that the Supreme Court would have followed the precedent."

Further pursuing this same theme—of the "built in" recognition of the pre-existing law of the Fourth Amendment, in the *Katz* decision itself—*Katz* pervasively abounds, it is practically saturated, with items of ruling and reasoning which overwhelmingly bespeak that the Court in *Katz* conceived that essentially it was applying *existing* law of the Fourth Amendment, indeed that it was applying the single most vital Fourth Amendment principle, the very central axiom of the Fourth Amendment, long and unquestioningly assumed by everyone as being

the heart of the Fourth Amendment, namely, the requirement of advance judicial approval for a search warrant. Except for the fact that *Katz* also did involve an express overruling at last of *Olmstead* and *Goldman, supra,* one may read the *Katz* decision in vain for any hint that the Court deemed itself to be laying down "new law"; and as to those overrulings, the *Katz* decision strongly articulates also that *Olmstead* and *Goldman* had long since lost their authority by erosion effected through a series of pre-*Katz* decisions incompatible with *Olmstead* and *Goldman.*

Thus, at 389 U. S. 352, the Court in *Katz,* in rejecting the Government's test of "physical penetration", commented that this test "was *at one time* thought to" be controlling (italics added). Similarly, at 389 U.S. 353, the Court, again speaking in a past sense of constitutionally established principle pre-dating *Katz,* stated that this test "has been discredited", citing *Warden* v. *Hayden,* 387 U.S. 294, 304. In similar vein, i.e., referring to the "penetration" or "trespass" tests as having lost authority pre-*Katz,* the Court said of the *Olmstead* case that "we have since departed from the narrow view on which that decision rested", and then the Court went on to quote the well known language from *Silverman* v. *United States,* 375 U.S. 505, 511, rejecting the test of "technical trespass under . . . local property law" (389 U.S. at 353). Still again, in this same vein, the Court referred in *Katz* (389 U.S. at 353) to the pre-*Katz* non-trespass standards by speaking of them as a pre-*Katz* accomplished decisional fact, the Court using the language "Once this much is acknowledged" in referring back to those pre-*Katz* developments. Next, at 389 U.S. 353-354, the Court wrote the following words which, we submit, constitute the plainest possible speaking that so called non-trespassory electronic eavesdropping was violative of the Fourth Amendment pre-*Katz*:

> "We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarding as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.
>
> The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. * * *"

Immediately following the above quotation the Court in *Katz* went on to describe and consider the Government's position "that its agents acted in an entirely defensible manner" with respect to the above quoted question posed by the Court of "whether the search and seizure conducted in this case complied with constitutional standards" (389 U.S. at 354-355).*

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* It deserves to be emphasized, we submit, that in the portions of the *Katz* decision above quoted and discussed, not only was the Court itself speaking of whether there had been compliance with "constitutional standards" plainly assumed to pre-date *Katz*, but also the Government in taking its litigational stand before this Court in *Katz* apparently found it appropriate to address itself to a showing that its agents had complied with pre-*Katz standards* that were not dependent on the "trespass" theory. We respectfully again emphasize, both this Court and the Government in *Katz* understood that one quite possible decisional direction portended by *Katz* was that this Court might well rule for petitioner *Katz* on the basis of pre-*Katz* non-trespass law; and in fact that was exactly what happened in *Katz* when the Court announced its decision (as we read the *Katz* case).

The thereafter immediately next following portion of the *Katz* decision (389 U.S. at 354-355), is too lengthy to quote here, as it includes extended footnotes by the Court; we summarize: The Court reasoned that, assuming the Government's agents had so behaved that they could have obtained a judicial warrant within the meaning of the pre-*Katz* decisions (the Court citing *Berger* v. *New York*, 388 U.S. 41; *Osborn* v. *United States*, 385 U.S. 323; *Ker* v. *California*, 374 U.S. 23; *Lopez* v. *United States*, 373 U.S. 427; *Nordelli* v. *United States*, 24 F. 2d 665), the conduct of the Government's agents nevertheless could not now be retroactively validated, for the reasons which we noted *supra, viz.*, that there had been no advance scrutiny and approval by a judicial officer on the issue of probable cause. In this last mentioned portion of the *Katz* decision the Court's reasoning in *Katz* struck perhaps its strongest note (as we earlier suggested) of insistence upon the applicability of the long-established pre-*Katz* Fourth Amendment standards (advance judicial approval of search warrants). This retrospectively established posture of the Fourth Amendment principles which the Court evidently deemed applicable in *Katz* is vividly expressed, for example, by the following language of the Court in which the Court spoke plainly in terms of pre-existing (i.e., pre-*Katz*) law (389 U.S. at 357):

> "* * * Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,' *United States* v. *Jeffers*, 342 U.S. 48, 51, 96 L. Ed. 59, 64, 72 S. Ct. 93, and that searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

In the above quotatoin in *Katz* we see the Court using such expressions as that "over and again" the Fourth Amendment requirement of "adherence to judicial processes" had been "emphasized" by the Court long before *Katz;* and that, apparently, so securely and long established had this pre-*Katz* Fourth Amendment principle become, that searches in violation of this principle—which the Court was declaredly applying in *Katz* as a principle declaredly long pre-dating *Katz*—or searches of the *Katz* type in violation of this principle were "per se unreasonable under the Fourth Amendment" (see the quotation immediately above).

Also interesting in the *Katz* decision—with reference to our same above theme that *Katz* was decided on pre-*Katz* Fourth Amendment law—is the portion of the *Katz* decision which follows immediately after our last given quotation, *supra.* That quotation ended, as seen, with a reference to "well-delineated exceptions", i.e., exceptions to the long-established Fourth Amendment principle requiring advance judicial approval for searches. The Court then went on (389 U.S. at 357) to point out that none of those exceptions could be applicable to electronic searches, and then the Court used the following significant language: "The Government does not question these basic principles. Rather, it urges the creation of a new execption to cover this case" (389 U.S. at 358). The "exception" which the Government wanted was that electronic surveillance of telephone booths should be exempted from "the usual requirement of advance authorization by a magistrate upon a showing of probable cause" (*ibid*). The Court rejected this request of the Government (*ibid*), but what we would here especially note is that, in this part of the *Katz* decision, there appears once again the absolutely taken-for-granted idea, on the part of both the Court and the Government, that the *Katz* electronic activity of the

Government's agents had to pass the muster of the pre-*Katz* Fourth Amendment "basic principles" (*supra*), and that the only escape from this for the Government in *Katz* would be "the creation of a new exception to cover this case" (*supra*). Could there be any clearer indication that the *Katz* decision was grounded on pre-*Katz* law? For indeed the Government itself implored the Court in *Katz* to law down a new, *prospective* "exception" to enable the Government to overcome the pre-*Katz* established law of the Fourth Amendment for the purpose of enabling the Government to win that case.

It is interesting also to trace the decisional history of the "trespass" theme which is said to have been authoritatively discarded only for the first time in *Katz*, but which we contend had lost any authoritative operativeness long before *Katz*. It is usually said that *Olmstead* and *Goldman* established the "trespass" rule. On re-reading *Olmstead* and *Goldman* one finds, however, that those cases did not "establish" the "trespass" rule. All that those cases did, in regard to the so-called "trespass" rule was that in their reasoning they spoke of a distinction between the respective fact situations there involved, and a "trespass" situation, but *Olmstead* and *Goldman* did not decisionally outlaw the "trespass" type of electronic instrusion. If the Justices will please re-read *Olmstead* and *Goldman* they will see that there is no *holding* in those cases that "trespassory" electronic monitoring is constitutionally bad; therefore, *Olmstead* and *Goldman* have never even needed to be "over-ruled" in the latter respect.

The first time, really, that "trespassory" electronic monitoring may be deemed to have been "held" constitutionally bad was in *Silverman* v. *United States*, 365 U.S. 505; or, rather, *Silverman* in "holding" that "trespass" is

indubitably bad, ruled also that the test of "trespass" was not going to be applied in a technical spirit, and that instead the test would be that of instrusion into a "constitutionally protected area".

This dilution, in *Silverman,* of the supposed "trespass" test underwent further dilution in *Wong Sun* v. *United States,* 371 U. S. 471.

All of this preceded *Katz* by several years. (See also our discussion of the *Osborn* decision, *infra.*)

We therefore submit that the touted idea that *Katz* for the first time made a radical departure, in Fourth Amendment terms, from some supposedly fixed concept of "trespass", is a myth, and that a critically careful reading of the pre-*Katz* decisions justifies if it does not compel interpreting *Katz* as having merely applied pre-existing Fourth Amendment law—as the Court itself in *Katz* so overwhelmingly indicated it thought it was doing (see our detailed analysis of the *Katz* decision, *supra*).

It remains to consider *Osborn* v. *United States,* 385 U. S. 323. Can there be any doubt that *Osborn,* decided in December 1966 (a year before *Katz*) portended, indeed decisionally anticipated or preempted, the outright articulation of the plenary "uninvited ear" principle of *Katz* and spelled the doom of the "trespass" test? Indeed, in *Osborn,* as here, the electronic device was concealed on the person of a police agent who, the "subject" thought, was a trusted associate of his. And still this Court in *Osborn* applied the Fourth Amendment requirement of an advance judicial "warrant". *It is not too much to say that Osborn, one year before Katz, laid down the same basic principle as in Katz, so far as concerns determination of the central issue in our case, namely, that the Fourth Amendment applies to so-called one-party-consent electronic eavesdropping.*

If we are correct in our above suggestions as to the impact of *Osborn*, the present case does not necessarily even turn at all on questions of retroactivity of *Katz*, and the judgment may be affirmed on the pre-*Katz* standards as most notably instanced in *Osborn*.

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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